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No. 94-834

In the

Supreme Court of the United States

October Term 1994

NORTH STAR STEEL COMPANY,
Petitioner,

v.

CHARLES A. THOMAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MEMORANDUM IN RESPONSE TO THE PETITION

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QUESTION PRESENTED

In actions brought under the Worker Adjustment and Retraining Notification Act ("WARN"), should courts borrow the limitations period from the National Labor Relations Act, as opposed to state law or another federal statute, such as the Fair Labor Standards Act?

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MEMORANDUM IN RESPONSE TO THE PETITION

We agree with petitioner that the question of the proper limitations period for suits filed under the Worker Adjustment and Retraining Act ("WARN") is one about which the lower federal courts have expressed widespread disagreement, which is not likely to be resolved until reviewed by this Court. Moreover, the limitations issue is cleanly presented in this case, and the ruling on this statute may affect limitations questions under a number of other federal statutes, about which the lower courts continue to disagree. Accordingly, the Court should grant certiorari.

STATEMENT

A. Facts.

Until 1991, petitioner North Star Steel Company operated a production facility in Milton, Pennsylvania. Most of its employees were paid by the hour and were represented in collective bargaining by the United Steelworkers of America ("USWA"). Respondents were salaried employees who did not belong to the USWA.

On February 25, 1991, petitioner announced that all of its employees would be laid off, effective immediately, for an indefinite period, and that the plant would be closed for the time being. None of the employees, hourly or salaried, was given any advance notice of this action. Petitioner refused to state how long the plant would be closed, or even whether the closure was permanent. Respondent Thomas made numerous inquiries about petitioner's plans, but received only vague and inconclusive answers.

On September 9, 1991, the USWA, not accepting petitioner's claim that it was unsure how long the layoff would last, filed suit claiming that North Star's failure to provide advance notice violated WARN. *USWA v. North Star Steel*, 809 F. Supp. 5, 6 (M.D. Pa. 1992), *aff'd*, 5 F.3d 48 (3d Cir. 1993). USWA sued only on behalf of the employees whom it represented, and it did not seek any relief for the respondents here. *Id.* at 7.

On April 9, 1992, the district court granted summary judgment against petitioner. *USWA v. North Star Steel Co.*, *supra*. On May 21, 1992, petitioner promised respondent Thomas that it would make the same payments to its non-union employees as the district court decided had to be made to the USWA's members. Although petitioner continued to make such promises, it ultimately provided respondents only with their accumulated vacation and severance pay, which would have been payable even if WARN did not apply.

B. Proceedings Below.

On October 23, 1992, respondents filed this action in the United States District Court for the Western District of Pennsylvania, alleging that petitioner's failure to notify them violated WARN. Petitioner's answer did not deny that it had violated WARN, but it did raise the statute of limitations as an affirmative defense. The district court granted summary judgment and dismissed on the ground that the most appropriate limitations period to borrow for WARN was the six-month period allowed by the National Labor Relations Act ("NLRA") for filing unfair labor practices charges with the National Labor Relations Board ("NLRB"). 838 F. Supp. 970, Pet. App. 17a-25a.

A unanimous court of appeals reversed. 32 F.3d 53 (3d Cir. 1994), Pet. App. 1a-16a. The court began by noting this Court's repeated holdings that, if a federal statute is silent on the statute of limitations, the normal rule is that courts should borrow the most closely analogous state law limitations period. *E.g.*, *Reed v. UTU*, 488 U.S. 319 (1989); *DelCostello v. Teamsters*, 462 U.S. 151 (1983), Pet. App. 5a-6a. Although there is an exception for cases where a federal limitations period "clearly provides a closer analogy" **and** the federal policies at stake make that rule "significantly more appropriate," *DelCostello*, 462 U.S. at 172, this exception is "closely circumscribed." *Reed*, 488 U.S. at 324. The court also noted this Court's expression of distress in *Reed* that many lower federal courts had failed "to take seriously our admonition" that borrowing from state law is the norm, and that using a federal statute is the rare exception, "in labor law as elsewhere." Pet. App. 6a.

Based on that standard, the court found no sound argument for borrowing from federal law. Although WARN cases and NLRA claims have some features in common, the purposes, procedures, rights and remedies of the two statutes are quite different. *Id.* 7a-11a. Nor were there serious reasons to believe that the interest in uniform limitations

periods, for federal statutes that encompass a broad variety of claims and legal theories, provided a basis for borrowing from federal law, as in the case of RICO claims. *Agency Holding Corp. v. Malley-Duff & Assoc's*, 483 U.S. 143 (1987). *See also Wilson v. Garcia*, 471 U.S. 261 (1985) (adopting a single characterization of section 1983 claims for state borrowing purposes). Pet. App. 12a-13a. Finally, an unduly short limitations period might well frustrate the ability of affected workers to bring claims. *Id.* 14a-15a. For all these reasons, the court of appeals held that a state limitations period, rather than section 10(b)of the NLRA, should be borrowed, and accordingly the court reversed the dismissal of respondents' claims.[1]

ARGUMENT

Although we strongly disagree with petitioners on the merits of the issue presented, we agree with petitioner that there is a division among the courts of appeals that is unlikely to be resolved without a decision by this Court. The Second Circuit has held, in agreement with the Third Circuit, that the statute of limitations for WARN actions is to be borrowed from state law. *Paperworkers Local 340 v. Specialty Paperboard*, 999 F.2d 51 (2d Cir. 1993). However, the Sixth Circuit recognized these decisions, but

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[1] Respondents below argued that, if the court did opt to borrow from federal law, it would not be limited to borrowing section 10(b) of the National Labor Relations Act. Respondents suggested, among other possibilities, borrowing section 6 of the Portal-to-Portal Pay Act, 29 U.S.C. § 255, which provides a two-year limitations period for seeking unpaid wages under the Fair Labor Standards, Walsh-Healey, or Bacon-Davis Acts. The court of appeals did not need to reach this argument in light of its holding that the normal rule of borrowing from state law should be applied. If certiorari is granted, respondents will argue in the alternative for borrowing such a federal period.

nonetheless held that the six-month period from section 10(b) of the NLRA is to be borrowed. *UMW v. Peabody Coal Co.*, No. 93-6020 (6th Cir., October 31, 1994). The Fifth Circuit initially opted for borrowing from the NLRA, but Senior Circuit Judge Wisdom penned a powerful dissent which is, in our view, probably the best single opinion that has been written on this subject, and the Fifth Circuit has since vacated its judgment *sua sponte* and scheduled the case for *en banc* argument early next year. *Halkias v. General Dynamics Corp.*, 31 F.3d 224, *en banc reh. granted*, (5th Cir. September 22, 1994). A case raising the issue is currently pending before the Tenth Circuit. *Frymire v. Ampex Corp.*, Nos. 94-1059, 94-1090 (10th Cir.). The issue has also been decided in district courts in the Seventh and Ninth Circuits, although we are advised that those particular cases are not on appeal. In summary, we acknowledge that there is division among the lower courts that needs to be resolved by this Court.

This is an appropriate case in which to consider the question because the respondents in this case are typical of the employees who enjoy rights under WARN, in a way that points up significant differences between WARN claims and the NLRA claims that petitioner claims are so analogous that borrowing from federal law is appropriate. After all, the NLRA gives unions a right to bargain about the effects of plant closings, but that right exists only when the employer has a duty to recognize and bargain with a collective representative of its employees. Because only about 11% of American private-sector workers engage in collective bargaining, the NLRA right extends to unions representing only a small minority of all potential WARN plaintiffs. The respondents here are non-union employees, thus making them far more typical of all WARN plaintiffs than union plaintiffs would be, which would bring into focus how different WARN is from the NLRA. In that sense, this may be the best case in which to decide the WARN limitations question, at least as compared to other cases, such as *Peabody Coal*,

in which the petitions would be filed on behalf of union employees.

The question presented here is important, not only because of the division among the circuits with respect to WARN, but also because of implications that the decision here would have for limitations under other statutes. Despite *Reed v. UTU*, some lower courts continue to "fail to take seriously [the] admonition" that borrowing from state law is the norm, and using a federal statute the rare exception, "in labor law as elsewhere." 488 U.S. at 324, 327. For example, some lower courts have misconstrued the Court's concern for "uniformity" in such cases and *Wilson v. Garcia*, *Malley-Duff*, and *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), where the Court adopted a single characterization of statutes that authorized a protean variety of claims, each of which might be characterized differently for limitations periods. A number of decisions by lower courts have opted for a different kind of uniformity -- adopting a single time period to govern litigation in the federal courts in every state, in order to avoid "forum-shopping" and to give defendants that operate in several different states a degree of certainty about when their exposure to litigation is ended. *E.g.*, *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1037 (2d Cir. 1992); *Haggerty v. USAir*, 952 F.2d 781, 786 (3d Cir. 1992). If that is what "uniformity" requires, of course, the result will be to create a presumption in favor of borrowing from federal law, because the **only** way to have the same amount of time for suing in every state is to use a limitations period adopted from a federal statute. This approach thus effectively reverses the long-standing presumption in favor of borrowing from state law.

The irony is that the misinterpretation of the term "uniformity" in the cases cited above occurred in circuits that have correctly applied this Court's teachings in the case of WARN, because both have refused to borrow from federal law for that purpose, in the decision below and in *Specialty*

Paperboard, supra. This intra-circuit difference in analysis simply points up the need for this Court to revisit the limitations area, and WARN presents a simple and straightforward opportunity to clarify the Court's holdings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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